No. 654

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1950

NEWARK SLIP CONTRACTING CO., INC.,
Petitioner,

—against—

NEW YORK CREDIT MEN'S ADJUSTMENT BUREAU, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

SAMUEL RUBIN
Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Justices of Supreme Court of the United States:

The petition of Newark Slip Contracting Co., Inc., a New Jersey Corporation, respectfully shows:

1. This is a petition for a writ of certiorari to review a determination of the United States Court of Appeals for the Second Circuit, affirming an order of the United States District Court for the Southern District of New York, denying your petitioner's petition to review a determination of Honorable John E. Joyce, Referee in Bankruptcy, and granting the petition of the respondent, New York Credit Men's Adjustment Bureau, Inc., trustee in bankruptcy, to review said order, and adjudging that your petitioner has no lien on certain property of Supreme

Lingerie Co., Inc., bankrupt. The opinion of the Circuit Court of Appeals is published in 186 F. (2d) 152; that of the District Court (sub. nom. *In Re Supreme Lingerie Co., Inc.*) in 90 F. Supp. 456.

2. Your petitioner is a "contractor", *viz.*, a fabricator of ladies' undergarments out of materials supplied by its customers. Its business is conducted in Newark, New Jersey. One of its customers was Supreme Lingerie Co., Inc. (hereinafter referred to as "Supreme"), engaged in the lingerie business in the City of New York. On February 21, 1949, Supreme entered into an agreement with your petitioner for the manufacture by your petitioner, out of materials to be supplied by Supreme, of 5,000 dozen ladies' slips at $2.75 per dozen, with adjustments for boxes, freight, etc., not material to this petition. Although all bills were rendered on a "net cash" basis, the arrangement which prevails generally in the industry, and which was adopted in the dealings between your petitioner and Supreme, was that payment for all work done in any week, ending on Friday, be made during the following week. Such short lapse of time is essential to permit the finished goods to be transported to the customer, received and examined, and, in the event of any defective work, returned to the contractor.

3. The use of the so-called contracting system is widespread and is the manner in which much of the manufacture of wearing apparel is carried on. The question whether the contractor has a lien (or whether, as the Court of Appeals held, he has waived any claim to a lien, even on the completed goods remaining in his hands) is of paramount importance, and the determination of the Court of Appeals sought to be reviewed has seriously affected

the conduct of the contracting business generally, and your petitioner in particular, because of the credit risks involved.

4. In the instant case, your petitioner received from Supreme "cut goods" for 1838 dozen slips. During the week ending March 18, 1949, it made up and delivered to Supreme 153 dozen completed slips, for which payment was due not later than the following week, ending March 25, 1949. During that week, and prior to March 25, 1949, your petitioner made up and delivered a total of 433 dozen slips. Having failed to receive payment for the first week's work when due, your petitioner declined to deliver any more completed slips and retained the balance of the goods which were in process and were subsequently completed.

5. On April 18, 1949, Supreme filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. On June 30, 1949, Supreme was adjudicated a bankrupt and respondent was appointed trustee. At the time of the appointment of the trustee, petitioner had on hand 1252 dozen slips on which it asserted a lien (a) in the sum of $3556.93 for the work done on those slips and (b) in the sum of $1744.40 for the work done on the 586 dozen (part of the same contract) previously delivered as above set forth. The completed goods were delivered to the respondent to be sold under a stipulation that petitioner's lien, if any, attach to the proceeds.

6. The learned referee in bankruptcy ruled that your petitioner had a lien on the goods which it had retained for the work done on those goods, but not for the value of the work on the goods which had been surrendered to Supreme.

7. Upon review, the District Court held that your petitioner had no lien whatsoever, and dismissed your petitioner's claim to have the amount of its lien determined. The Court of Appeals affirmed. It is that determination which your petitioner seeks to review.

8. This Court has jurisdiction to review the judgment of the Court of Appeals, this petition being for a writ of certiorari authorized by Title 28, §1254, U. S. C. A.

9. The questions presented are:

(a) Does the Bankruptcy Act permit a trustee in bankruptcy to compel a bailee for hire, whose labor and skill have enhanced the value of bailed goods, to return such goods free of his common-law lien, merely because such bailee had previously extended credit to the bankrupt for his work done on other lots previously delivered?

(b) Apart from bankruptcy, does the extension of credit by a bailee for hire, under New Jersey law, operate to destroy his common-law lien on goods in his possession for work done thereon, where the bailor has failed to make payment within the time agreed upon for work done on goods previously delivered?

10. Your petitioner respectfully urges that this case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

(a) Because an important and vital question of law is involved touching upon the effect of an adjudication in bankruptcy upon the relationship between a bailor and bailee for hire with respect to the latter's lien on goods in his possession for work done thereon.

The question whether an agreement between bailor and bailee for the extension of credit deprives the bailee of his common-law lien under such circumstances, is of far-reaching importance in the wearing apparel industry and has not been, but should be, settled by this Court.

(b) Because the decision of the United States Court of Appeals for the Second Circuit sought to be reviewed appears to be in conflict with decisions in other circuits on the effect of an adjudication in bankruptcy on existing contracts (*e.g. Heyward* v. *Goldsmith*, 269 Fed. 946, C. C. A. 3rd Circ.; *Greif Bros.* v. *Mullinix*, 264 Fed. 391, C. C. A. 8th Circ.).

(c) Because the determination sought to be reviewed, though based upon New Jersey law, is probably in conflict with applicable decisions of the New Jersey courts.

Wherefore, your petitioner respectfully prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the United States Court of Appeals for the Second Circuit to bring this cause to this Honorable Court for such proceedings as may be just.

Dated, New York, April 2, 1951.

Newark Slip Contracting Co., Inc.

By Leopold Cohen, Secretary
Petitioner

Samuel Rubin
Attorney for Petitioner
280 Madison Ave.
New York City

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

LEOPOLD COHEN, being duly sworn, deposes and says: that he is the Secretary of Newark Slip Contracting Co., Inc., the Petitioner herein; that he has read the foregoing Petition; that the same is true to his own knowledge, information and belief; that his knowledge is derived from the record in this case and facts with which he is personally acquainted.

LEOPOLD COHEN

Sworn to before me this
2nd day of April, 1951.

SHIRLEY W. ROSEN
Notary Public, State of New York
Qualified in Kings County
Cert. filed with Kings and New York County
Clerk's and Register's Office
Commission Expires March 30, 1953

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OCTOBER TERM—1950

NEWARK SLIP CONTRACTING CO., INC.,

Petitioner,

—against—

NEW YORK CREDIT MEN'S ADJUSTMENT BUREAU, INC.,

Respondent.

SUPPORTING BRIEF

Basis of Court's Jurisdiction

Jurisdiction in this Court arises under Title 28, Section 1254, U. S. C. A., this being a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a final judgment and determination of that Court which is subject to review by certiorari.

The Questions Presented

Two questions of vital importance to a large segment of the needle-work industry (which itself is a substantial factor in our economic life) are presented by this petition. The determination sought to be reviewed has virtually destroyed the protection of the common-law lien upon which a bailee for hire, whose work has enhanced the value of the

goods entrusted to him, has traditionally relied. The questions presented are:

(1) Does the Bankruptcy Act permit a trustee in bankruptcy to compel a bailee for hire, whose labor and skill have enhanced the value of bailed goods, to return such goods free of his common-law lien, merely because such bailee had previously extended credit to the bankrupt for his work done on other lots previously delivered?

(2) Apart from bankruptcy, does the extension of credit by a bailee for hire, under New Jersey law, operate to destroy his common-law lien on goods in his possession for work done thereon, where the bailor has failed to make payment within the time agreed upon for work done on goods previously delivered?

The Determination Sought to be Reviewed

The opinion of the Court of Appeals for the Second Circuit is reported in 186 F. (2d) 152. It affirms an order of the United States District Court for the Southern District of New York, reported in 90 F. Supp. 456.

ARGUMENT

I

An important question of law touching upon the effect of an adjudication in bankruptcy upon the relationship of bailor and bailee for hire with respect to the latter's lien should be settled by this court.

Petitioner and the bankrupt entered into an oral agreement whereby petitioner, as contractor, agreed to manufacture 5,000 dozen ladies' slips from cut goods furnished by the bankrupt at a fixed price per dozen. No provision was then made for the extension of credit. Petitioner testified that all billings were "net cash", but that it was its practice to accept payment during the following week for all work done to and including the preceding Friday as equivalent to net cash (Record, fol. 70). This was the only proof as to the extension of credit, and the Referee in Bankruptcy found that the original agreement did not involve the extension of credit, but that the practice of making weekly payment prevailed generally between petitioner and those for whom it did work (Record, fols. 136-7).

From the very fact that the practice of "contracting" in the apparel industry of necessity involves the delivery of finished goods from the plant of the contractor to the plant of his customer, it is hardly expedient to make delivery and payment concurrent conditions. The practice adopted of making weekly settlements is obviously born of necessity—to enable delivery to be made (here from petitioner's plant in Newark, New Jersey, to Supreme's plant in New York City), the finished work to be inspected, etc. We are not here dealing with anything more than a minimum extension of credit, sufficient to enable the parties

to the transaction to complete, in a normal way, a simple business arrangement.

In the instant case petitioner delivered to the bankrupt during the week ending Friday, March 18, 1949, 153 dozen completed slips (fol. 69). Payment for that work was due not later than the following Friday, March 25, 1949 (fol. 71). Since the bankrupt was not then in default, petitioner continued to make up and deliver slips during that week, to the extent of 433 dozen (fol. 71). Having failed by March 25th to receive payment for the work done during the preceding week, petitioner declined to make delivery of any further goods, which were then in process of manufacture, and asserted its lien thereon for work so done by petitioner.

On April 18, 1949, the bankrupt filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, which culminated in an adjudication in bankruptcy on June 30, 1949 (fol. 23).

Petitioner argued to the Court of Appeals that even on the assumption that there was a true extension of one week's credit (rather than a mere convenient method of paying on an approximately "net cash" basis), such extension of credit could not possibly have contemplated the continued delivery of completed goods long after the time for payment for earlier deliveries had elapsed and the bankrupt had defaulted. Petitioner urged that a one week's extension of credit would involve only a minimum credit risk in a contract which contemplated a continuous operation of ten weeks or more at the normal rate of production. Petitioner would, of course, have on hand, except possibly during the last week, sufficient of the bankrupt's goods to secure payment of any obligations which accrued for finished goods delivered on credit during the preceding week.

Petitioner argued that it would be a monstrous thing if a contractor, having committed himself to the extension of one week's credit, would be required, *after his customer's default,* to complete the contract, make up the balance of the goods, and deliver them to the trustee in bankruptcy, without hope of payment.

The learned Court of Appeals rejected petitioner's argument and held that, having made up the balance of the slips entrusted to it, petitioner must deliver them to the trustee in bankruptcy, free of any lien for the value of its labor, because its agreement with the bankrupt had involved an extension of credit, however limited. This, the learned Court held, was so notwithstanding that the bankrupt had concededly defaulted in its obligation to pay for the earlier deliveries in conformity with the contract.

There appears to be no controlling decision by this Court on the effect of bankruptcy on an arrangement such as is here involved.

Assuming, but not conceding, that in the absence of bankruptcy, the extension of credit by petitioner to the bankrupt might have involved a waiver of lien, not merely on the goods delivered, but even on the goods retained, surely an adjudication in bankruptcy negatives the possibility of performance by the bankrupt of any of the terms of the contract and constitutes an anticipatory breach thereof.

> *City Bank Farmers Trust Co.* v. *Irving Trust Co.,* 299 U. S. 433, 440.

Under Section 70(b) of the Bankruptcy Act, the trustee may assume executory contracts. When a trustee does so, he assumes all the bankrupt's obligations under the

contract as well as his rights (4 Collier on Bankruptcy [14th Ed.] 1235 and cases cited).

In the instant case, if the decision of the learned Circuit Court is correct, the estate of the bankrupt has succeeded in receiving and retaining the benefits of the contract and seems to have been wholly relieved of its obligations. Such result, it is urged, does not square with the clear purpose of the Act.

Since the method of extending a few day's credit is the *modus operandi* which prevails generally in the handling of transactions between contractors and their customers, the determination by this Court of the respective rights of the contractor and his customer, in case of the latter's bankruptcy, is of vital importance in an industry in which many millions of dollars worth of labor is supplied in the fabrication of every conceivable type of wearing apparel.

II

The determination sought to be reviewed appears to be in conflict with decisions in other circuits as to the effect of bankruptcy upon executory contracts.

In the instant case, the learned Court below stated (186 F. [2d] 152, 154):

> "But even if we assume that the bailor's breach of contract would have justified the bailee in refusing to go on, he did not repudiate the contract; he went on making up the goods. If one party to a contract continues performance after a breach by the other he must continue on the contract terms. The breach does not permit him to make a new contract without the

other's consent; *nor does the bankruptcy.*" (Italics ours.)

But, we respectfully suggest, the election by the respondent, as trustee, to avail itself of the benefits of the contract, involves, of necessity, the assumption of all its obligations, including such obligations as the bankrupt should have performed.

In the instant case, a petition for an arrangement was filed on April 18, 1949 (fol. 23). The subsequent adjudication related back to that date.

Bankruptcy Act, Section 378 (2).

There is no suggestion that petitioner's work on the garments had been completed by that date. Quite the contrary. The undisputed testimony is that at the time of the filing of the petition the goods were "somewheres in process; and a great many of them were finished" (fol. 65). It is thus apparent that to some extent, at least, the respondent, as trustee in bankruptcy, is seeking to receive the benefit of the bankrupt's contract, and yet is unwilling to assume the bankrupt's contractual obligations.

In *Greif Bros. Cooperage Co.* v. *Mullinix,* 264 Fed. 391 (C. C. A. 8th Circ.), the Court required the Greif company (p. 397) "to continue and complete the performance of the contract, and subjected the trustee and the estate to the liability on their part to *perform the bankrupt's* part of the contract according to its terms." (Italics ours.)

In the above case, Greif had, at the time of the filing of the petition in bankruptcy, made advances of money and had performed labor in the manufacture of logs into staves. After the filing of the petition, Greif continued

to perform, at the trustee's request, and completed his contract. Reversing the determination of the District Court, the Eight Circuit Court of Appeals said (p. 397):

> "The trustee and the court below accepted the benefits of the Greif Company's performance and advances, and by their action they are estopped from denying the liability of the trustee and the bankrupt estate to bear the burdens of that contract and of its performance."

To the same effect:

> *Rosenblum* v. *Uber,* 256 Fed. 584, 590 (C. C. A. 3rd Circ.).

If, on the other hand, the respondent, as trustee, is not deemed to have affirmed the contract by accepting its benefits, it follows of necessity that the adjudication constitutes an anticipatory breach by the bankrupt of its contract with petitioner. The obligation of the bankrupt was to pay for petitioner's labor within the week after such labor was performed. Even if it be assumed that the bankrupt had not already committed a material breach of its contract (an assumption which seems untenable) the adjudication destroyed any semblance of power on the part of the bankrupt to perform.

> *City Bank Farmers Trust Co.* v. *Irving Trust Co.,* 299 U. S. 433, 440.

In *Heyward* v. *Goldsmith,* 269 Fed. 946 (C. C. A. 3rd Circ.) the Court stated (p. 949):

> "It must be deemed an implied term of every contract that the promissor will not permit himself, through

> insolvency or acts of bankruptcy, to become unable to perform the contract. Bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt in violation of his engagement in the contract, and bankruptcy proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement."

The determination sought to be reviewed appears to conflict with the principles underlying those cases.

III

The determination sought to be reviewed is in conflict with applicable decisions of the New Jersey courts.

(a)

As to the Effect of Bankrupt's Breach

The Court below, in its opinion, said:

> "In New Jersey the rule appears to be that default by one party in making payment for one delivery does not release the other party from his duty to make the other deliveries stipulated in the contract, unless the conduct of the party in default evinces an intention to abandon the contract or a design no longer to be bound by its terms."

The Court cited *Blackburn* v. *Reilly,* 47 N. J. L. 290, 308. That case involved a question which, in the language of the Court (p. 308) "has given rise to some contrariety of judicial opinion." The learned Court below, we believe,

overlooked the fact, called attention to in *Dupont* v. *United Zinc Co.*, 85 N. J. L. 416, at p. 419:

> "The rule formerly established in *Blackburn* v. *Reilly*, 18 Vroom (47 N. J. L.) 290 has been changed by statute. Sale of Goods act, §45; Comp. Stat., p. 4657."

That the New Jersey Courts follow accepted principles of contract law is clear from *Thompson & Co.* v. *Atlantic County*, 106 N. J. L. 355, in which the Court adopted the language of *Mansfield* v. *N. Y. C. R.R. Co.*, 102 N. Y. 205:

> "It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes the doing of some act on the part of the other prior thereto, that the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or when rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned against the defaulting party."

Similarly, in *Hermenau* v. *Zazzarino*, 108 N. J. Eq. 451, the Court said (p. 453):

> "Moreover, the second paragraph of the contract provides that complainant pay to *Zazzarino* not less than $1000 a year during the term of the contract. He does not attempt to say that he paid *Zazzarino* anything. It would seem, therefore, that there was non-performance on the part of the complainant and that he has no right in such a situation to demand performance on the part of defendant."

By the decision of the Court below, petitioner is, in effect, told that because it extended one-week's credit to the bankrupt, it must lose not only payment for that week's work, but also must sacrifice its right to payment for work thereafter done, for which it extended no credit, and to secure payment of which it held fast to the finished garments. That, we urge, does not conform to accepted principles of law, whether in New Jersey or elsewhere.

(b)

As to Petitioner's Lien

New Jersey has a so-called "Processor's Lien Act" (N. J. S. A. 2:60-221). The learned Court below held that petitioner was not a "processor" within the statutory definition. We do not seek to review that determination, for there appears to be no controlling New Jersey decision, and so the Court noted in its opinion. The question, however, is academic, for the Court ruled that petitioner had waived its lien, whether common-law or statutory. We press our point only with respect to petitioner's claim to a common-law lien.

It cannot be disputed that the New Jersey law recognizes the existence of an artisan's lien at common-law. In *Stone* v. *Allied Clothing Corporation,* 140 N. J. Eq. 244, the case referred to in the opinion of the Court below, the Court said:

> "In the absence of statute and if not waived by the parties, *Allied* had a common law lien on the suits it made for *Tip Top* to secure the amount due for making those particular suits."

In *White* v. *Smith,* 44 N. J. L. 105, it was held that a workman who by his skill and labor has enhanced the

value of a chattel under an employment to render the service by the consent, express or implied, of the owner, has a lien on the chattel for his reasonable charge.

To the same effect:

O'Brien v. *Buxton,* 9 N. J. Misc. 876, 878;
Sullivan v. *Clifton,* 55 N. J. L. 324.

It is stated, however, that petitioner, by the agreement to extend credit, waived any lien which it had, whether common law or statutory. An examination of the *Stone case,* upon which the Court based its decision, discloses that it is not authority for the proposition that an agreement to extend credit bars any claim of lien after default by the bailor in payment for earlier deliveries. No such question was raised or decided.

The *Stone* case involved a complex set of facts in which all the parties, including the bankrupt and contractor, were closely related corporations. The bankrupt, Tip Top Tailors, Inc., had been formed as an affiliate of a Canadian corporation of similar name to sell clothing at retail. In conjunction with another retail clothier, Joseph Hilton & Sons, Tip Top had formed Allied Clothing Corporation, whose function was to manufacture clothing out of woolens supplied by Tip Top and Hilton.

The method of operation was for Tip Top and Hilton to sell suits to measure, each suit being ordered separately upon the specifications given for each retail customer. A large quantity of woolen fabrics had been entrusted to Allied to be used by it in making up suits when and as ordered. The basic agreement between the bankrupt and Allied contained the following provision:

> "No right, title or interest in and to any such woolens, cloths, trimmings, or other materials, shall pass to, or become vested in, the manufacturer (Allied)."

Provision was made for the payment for work done by Allied on a semi-monthly basis.

About a month before the petition was filed, when Tip Top, the American company, found itself financially involved, the principals of the Canadian corporation, referred to in the Court's opinion as "Limited," sought to rehabilitate the American company. At that time, Allied, the closely associated contractor, had on hand, in addition to some suits which were in process, a large quantity of woolens belonging to Tip Top but held by Allied in reserve for possible future orders. The accounts between Tip Top and Allied then stood as follows: Allied claimed a lien of $17,000, not only on the suits, but also on the woolens, on the theory that it was a "processor" and, under the statute would have a lien on *any property* of Tip Top in its possession. On the other side of the ledger, Allied was indebted to Tip Top on open account, not yet due, in the sum of $14,750. At that time (one month before the bankruptcy proceeding) Allied was paid $16,750 by "Limited," the Canadian company (pp. 229, 230). Of that sum, $10,750 was supplied by "Limited" in the form of an advance secured by the delivery to "Limited" of the woolens previously in Allied's possession (p. 237). There were other phases of the transaction, not here material, other than to note that, in an earlier decision (138 N. J. Eq. 472) the Court of Errors and Appeals had held that, insofar as there were any transfers of assets of Tip Top to the other related companies, they constituted preferential payments, since the recipients were aware of Tip Top's insolvent condition.

In this complex situation (Allied having been fully paid a month before the bankruptcy) there was presented to the Court the question whether the Canadian company had a lien on the woolens belonging to the bankrupt which it had received from Allied when it paid Allied's claim. In that connection alone, the Court first felt it necessary to determine whether Allied had had a lien on those woolens. It was incident to the discussion of that question that the Vice Chancellor noted that there had been a special agreement by the express terms of which no interest in the woolens vested in Allied. The Court said (p. 332):

> "The agreement that no right or interest in the woolens shall become vested in Allied, is broad enough to exclude the statutory lien on the woolens."

Obviously, there could be no common law lien, for Allied had done nothing to enhance their value.

Strangely enough, the Court nevertheless ruled that, since the Canadian corporation had acted in good faith and in the belief that Allied did have a lien, it was entitled to hold the woolens it had received from Allied as security for the $10,750 it had paid to Allied by reason of Allied's claim of lien. As the Court said (p. 237):

> "All the parties, guided by their lawyers, acted on the basis that the lien was valid."

The distinction between the *Stone* case and the instant case is readily apparent. In the instant case, no lien is claimed on raw materials, not enhanced in value by petitioner's services. In the instant case, there has been no express agreement that no interest in the goods shall vest in petitioner. In the *Stone* case, each suit manufactured was a separate order, and the express agreement required surrender of possession before payment. In the instant

case, there was but a single contract requiring payment of part before the completion of all the work on that single contract.

Although we are not presently concerned with the statutory lien under the Processors' Lien Act, the decision in the *Stone* case is based upon that statute. It could not have been the purpose of the Court in that case to hold that any extension of credit *ipso facto* operates as a waiver of any lien, statutory or common law, for the very language of the statute (L. 1928, Cr. 253) indicates beyond question that it was intended to *create* rights based upon the extension of credit rather than *destroy* rights because of the extension of credit. As appears from the text of the statute, it gives the processor a general lien on goods remaining in his possession not only for the work performed on those goods, but also on the goods which he had previously fabricated and returned to his customer, obviously on credit. The preamble to the statute reads:

> "Whereas it is the custom of manufacturers and others to send property to various processors, to be processed, and such processors, relying on their ability to hold such property as security for the entire indebtedness, *habitually extend very liberal credit to such manufacturers and others, etc.*" (Italics ours.)

It is clear, therefore, that the determination of the Court below that any extension of credit negatives the possibility of any lien, statutory or common-law, is not in harmony with New Jersey law.

CONCLUSION

It is respectfully urged that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

SAMUEL RUBIN,
Attorney for Petitioner.

FILED
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CHARLES ELMORE CROPLEY
CLERK

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

No important question of Federal Law has been decided by the Court of Appeals which should be settled by this Court.

No important question of law as urged by petitioner is here involved. The determination of the Court of Appeals was based solely on a waiver of lien by a bailee for hire, and not on the effect of an adjudication in bankruptcy upon such lien. The subsequent bankruptcy of the bailor was merely a factual incident which the court stated did not change the effect of the contract made by the bailee with its bailor.

> "Where the contract gives the bailor a credit, his subsequent insolvency does not entitle the bailee to a lien."

Petitioner inflates the importance of the true question which was decided by the Court of Appeals. In its first

argument it offers its own interpretation of the facts, repeats arguments made to the court below, but fails to clearly define or present any important question of Federal Law requiring settlement. No ground for the granting of a writ of certiorari is thus presented.

Petitioner belabors its own proof as to the extension of credit. The testimony on this score is clear and definite (fols. 69, 71, 72). All of the courts below found without equivocation that credit had been extended but petitioner characterizes it as an "immediate extension of credit, sufficient to enable the parties to the transaction to complete, in a normal way, a simple business arrangement." Petitioner offers its unsupported explanation that this is the normal method adopted between a bailor and his bailee for hire, and seeks thereby to create an inference that its contract with the bankrupt did not contemplate the extension of credit. What petitioner truly means is that had it known then what it knows now it would not have relied upon the general credit of the bankrupt. However, the inescapable fact remains that the extension of credit to, and reliance upon the general credit of the bankrupt was an open covenant openly arrived at. Petitioner was never under any compulsion to do otherwise; no exigencies existed which necessitated an arrangement other than the one which it actually made with the bankrupt. Petitioner was not confronted with any problem in regard to payment on delivery if that actually had been the agreement. The general practice of contractors in the clothing industry is to require payment on delivery. As an instance, the registration agreement between manufacturers and contractors in the men's apparel industry states:

> "Contractors must be paid by manufacturers upon delivery of all work."

Petitioner misinterprets the decision of the Court of Appeals. There is no holding therein that upon a bailor's default a bailee who extends credit must complete the contract by manufacturing the balance of the goods and deliver same to the Trustee in Bankruptcy without hope of payment. Petitioner's argument on this point was answered as follows by the Court of Appeals:

> "This argument misconceives the effect of the bailor's default in failing to pay for the instalments delivered in March. In New Jersey the rule appears to be that default by one party in making payment for one delivery does not release the other party from his duty to make the other deliveries stipulated in the contract, unless the conduct of the party in default evinces an intention to abandon the contract or a design no longer to be bound by its terms. But even if we assume that the bailor's breach of contract would have justified the bailee in refusing to go on, he did not repudiate the contract; he went on making up the goods. If one party to a contract continues performance after a breach by the other he must continue on the contract terms. The breach does not permit him to make a new contract without the other's consent; nor does the bankruptcy."

A bailor's subsequent bankruptcy in no way affects the contractual obligations between it and its bailee for hire. If credit was not extended, the bailee's lien continues with equal force and effect with or without a subsequent bankruptcy of the bailor.

The Trustee in Bankruptcy was not appointed until June 30, 1949, several months after petitioner had completed the work. There were, therefore, no existing con-

tractual obligations for the Trustee to assume or reject.

If, as petitioner argues, the bankruptcy constituted an anticipatory breach of its agreement with the bankrupt, petitioner was not compelled or required to continue its performance thereunder. There is no proof whatever that it was requested or required by anyone to so continue. Having elected to continue performance, then as the Court of Appeals held, it must continue such performance on the contract terms, because the breach did not permit it to make a new contract without the bankrupt's consent. The fact, however, is that petitioner had completed performance prior to the bailor's bankruptcy (fol. 64).

The Court of Appeals did no more than reaffirm a well established principle of New Jersey Law and apply the same to the facts appearing herein.

II

The decision of the Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

The determination of the court below relates solely to a question of New Jersey law even though the principle enunciated therein may have acceptance outside that state and is in accord with the pronouncement of other states. As we have pointed out *infra,* the question presented to the court below was whether the extension of credit by a bailee for hire constituted a waiver of its common law lien on the property of the bailor in its possession. The effect of bankruptcy upon executory contracts was not here involved. Petitioner's attempt to establish a conflict with decisions in other circuits which relate solely to the effect of bankruptcy upon executory contracts is inapposite,

without merit and inadequate as a basis for the granting of its petition for a writ of certiorari. Nonetheless no conflict exists between the holdings in the cases cited by petitioner and that of the court below. The facts in the cited cases are clearly distinguishable from those here.

In *Greif Bros. Cooperage Co.* v. *Mullinix*, 264 Fed. 391, the *Trustee, with the consent and approval of the court, ratified and affirmed the agreement between the bankrupt and Greif Bros.* (Italics ours.) The Circuit Court correctly held that since the Trustee and the court had accepted the benefits of the Greif company's performance, the Trustee was estopped from denying his and the bankrupt estate's liability to bear the burdens of the performance of the contract according to its terms. In the case at bar there had been no affirmance or acceptance by the Trustee of the bankrupt's agreement with the petitioner; indeed such acceptance and affirmance was impossible because petitioner completed its work before the bailor's bankruptcy, and a Trustee was not appointed until June 30, 1949, several months after such completion. Petitioner's reference to undisputed testimony that at the time of the filing of the petition the goods were "somewheres in process; and a great many of them were finished" is not correct because immediately preceding the answer referred to we find (fol. 64):

> "Q. Now, at the time of the filing of the petition did you have on hand in the form of cut goods the remainder of the goods that had been previously shipped to you for processing? A. *Not in the form of cut goods. In the form of made up goods.*" (Italics ours.)

In *Heyward* v. *Goldsmith*, 269 Fed. 946, the court was concerned with the proving of a claim against the bank-

rupt estate. No question as to the lien of a bailee for hire was involved. It enunciated the principle that an adjudication in bankruptcy is the equivalent of an anticipatory breach of an executory agreement. This in no way conflicts with the determination of the court below which accepted that principle when it said:

> "But, even if we assume that the bailor's breach of contract would have justified the bailee in refusing to go on, he did not repudiate the contract; * * * "

However, petitioner did not, by reason of the bankruptcy proceeding, repudiate its contract with the bankrupt but on the contrary elected to continue its performance thereunder. We question that any further performance was required because we believe the facts establish that performance was completed before the institution of the arrangement proceeding. Even if performance continued after the institution of such proceeding, it was not at the request or with the consent or approval of the Trustee or of the court, and it was a purely voluntary act on petitioner's part.

Nor may the Trustee be deemed to have affirmed petitioner's contract with the bankrupt by accepting the benefits of petitioner's continued performance. The inescapable conclusion is that if petitioner voluntarily continued performance after the bankruptcy, it was for the purpose of enhancing the value of the goods in its possession in the mistaken view that it was thus acquiring greater protection of the bankrupt's debt to it.

The other cases cited by petitioner, *Rosenblum* v. *Uber*, 256 Fed. 584, and *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, are also inapplicable. They relate to landlord's claims against bankrupt estates and there

is nothing whatever in either of these cases from which an analogy might conceivably be drawn to warrant their citation here. The questions for determination in these cases are concisely stated as follows. In *Rosenblum* v. *Uber, supra,* the Circuit Court said (p. 590):

> "This subject matter, so far as it is relevant to the issues of this case, is, landlords and tenants, and rents payable to one by the other."

In the *City Bank Farmers Trust Co.* v. *Irving Trust Co., supra,* this Court said (p. 443):

> "The question for decision in this case is whether the claim recognized by §77B, which would not have been an enforceable demand at common law, or under the laws of many of the states, is allowable only if the leasehold estate has not, after rejection of the lease, been drowned by surrender effective under state law or otherwise terminated pursuant to state law by the lessor's conduct."

We submit that there is no conflict between the determination sought to be reviewed with decisions in other circuits on the same subject.

III

The determination sought to be reviewed is not in conflict with applicable local decisions.

All of petitioner's arguments are based upon an interpretation of the decision of the court below which is without any legal or factual foundation. As we have already demonstrated, its argument is replete with misstatements

of fact and misconstruction of the relatively simple principle of law enunciated by the court below which is:

> "* * * if the contract of bailment provides for redelivery before payment is due, no lien arises because it is apparent that the bailee has extended credit and has not relied upon the existence of a lien to secure payment."

As an instance of this, petitioner, in its attempt to establish a conflict with local decisions, quotes a sentence from *DuPont* v. *United Zinc Co.*, 85 N. J. L. 416. It infers thereby that the principle cited by the court below from *Blackburn* v. *Reilly*, 47 N. J. L. 290, has been changed by statute. Such is not the fact. The statute referred to is the Sale of Goods Act now known as "New Jersey Statutes Annotated Property Title 46, Section 46; 30-51" which applies only to "a contract to sell goods to be delivered by stated installments." The change, if any, made by the statute, concerns the question of release of one party to a contract upon the other's breach thereof. The rule in *Blackburn* v. *Reilly* is that release is effective if the conduct of the party in default evinces an intention to abandon the contract or a design no longer to be bound by its terms. The test specified in the statute is that "it depends in each case upon the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further." At best, any change brought by the statute would be limited to the type of contract specified therein. *Blackburn* v. *Reilly*, decided by the highest court in New Jersey, has continued to be and still is the law of that state. It has been cited with approval and followed in the most recent cases on the subject. *Vine* v. *Robert W. Kennedy Co.*, 2 N. J. Misc. 777 (1924) and

Dun & Bradstreet v. *Wilsonite Products,* 130 N. J. L. 24, (1943). It appears that *DuPont* v. *United Zinc Co.* decided by a lower court, stands alone on its own facts.

Even if it be assumed that *Blackburn* v. *Reilly* was no longer the law of New Jersey, no conflict would exist between the determination of the court below and applicable local decisions. The Court of Appeals' reference to *Blackburn* v. *Reilly* was incidental to its decision and was not determinative thereof. Whether petitioner, by reason of the bankruptcy, was or was not released from performing its part of the contract is of no moment, because, as was said by the court below, it did not repudiate the contract but continued performance, and neither the breach nor the bailor's bankruptcy permitted it to make a new contract without the bankrupt's consent. Petitioner's argument is devoid of any reference to this principle or to the supporting authorities cited by the court below.

The basic question presented here was whether petitioner had a lien on the bankrupt's goods in its possession either under common law or by statute and the extent of such lien, whether general or specific. Since the work was performed in New Jersey the law of that State as to liens was controlling. If the bailor's subsequent bankruptcy constituted a breach of the contract, this in no way affected the waiver by petitioner of any lien which it might have had.

The holding of the court below with respect to petitioner's waiver of lien in no way conflicts with the applicable decisions of the New Jersey Courts. Petitioner has failed to cite any contrary decisions of the courts of that state. As in its argument to the court below, petitioner discusses at length *Stone* v. *Allied Clothing Corporation,* 140 N. J. Eq. 244 but still fails to establish its inapplica-

bility to the present case. From its discussion of that case we gather that petitioner seeks a reversal of the holding therein, for which purpose its petition for a writ of certiorari serves no function.

Petitioner urges that by the decision of the court below it is, in fact, told that because it extended one week's credit to the bankrupt it must lose not only payment for that week's work but must also sacrifice its right to payment for work thereafter done *for which it extended no credit.* (Italics ours.) Petitioner's conclusion is erroneous because by its contract with the bankrupt it extended credit for *all* work to be performed for the bankrupt. Moreover, as the court below held, it could not by reason of the bankruptcy change its contract with the bankrupt. That is the law of New Jersey and petitioner's argument is completely silent with respect thereto. It has made no attempt whatever to show any conflict between the New Jersey cases and the decision of the court below on this principle, and none exists. Neither does the lower court's treatment of any of the collateral principles of law discussed by it conflict with applicable local decisions.

CONCLUSION

Petitioner has failed to establish any basis for the granting of its petition for a writ of certiorari and it is respectfully requested that the same be denied.

Respectfully submitted,

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